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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 26

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALCEA BAND OF TILLAMOOKS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

EVERETT SANDERS,
Shoreham Building,
Washington, D. C.
JOHN G. MULLEN,
North Bend, Oregon,
E. L. CRAWFORD,
Salem, Oregon,
Attorneys for Respondents.

L. A. GRAVELLE,
DOUGLAS WHITLOCK,
EDWARD F. HOWREY,
Of Counsel.

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Opinion Below

The opinion of the Court of Claims (R. 21-83) is not yet officially reported.

Questions Presented

The questions presented (Pet. p. 2) are not, we believe, stated with the precision required by the findings of the court below.

We take the liberty of restating such questions as follows:

1. Whether respondents can recover on proof of taking of lands held by original Indian title where the Jurisdictional Act specifically authorizes suit on "any and all legal and equitable claims arising under or growing out of the original Indian title."

2. Whether respondents can recover under such a jurisdictional Act upon such proof where the original Indian title was also recognized by the United States (finding 20, R. 50) but was not expressly conceded through a ratified treaty.

Statute Involved

The special Jurisdictional Act is set forth in full text in the Appendix, *infra*, pp. 19-21.

Statement

The statement made by Petitioner is substantially accurate, except there is no reference in the statement to Finding 20. The statement does show the taking for public use without compensation of Respondents' lands held by Indian title based on immemorial possession.

Practically every finding is given in substance in Petitioner's statement with the exception of Finding 20. This finding reads as follows:

> "Failure to ratify the treaty of August 11, 1855, left the recognized original Indian title, which the United States took without making compensation, in the Tillamook, Coquille, Too-too-to-ney, and Chetco tribes; and left the United States without legal or equitable rights, under principles applicable to the recognized aboriginal Indian use and occupancy title, to take and treat the lands, exclusively held and possessed by the particular tribes, as public lands without payment of just compensation" (R. 50).

Although the making of this finding of recognition is not assigned as error or given as a reason for granting the writ, the Petitioner nevertheless seeks to have the general question of "formal recognition" reviewed by this Court.

The evidence not having been brought up, nor the motion for a new trial, this honorable Court will not review "errors assigned to the effect that there is a lack of substantial evidence to sustain the finding of facts." Section 3(b) of the Act of Feb. 13, 1925 as amended by the Act of May 22, 1939, 28 U. S. C. (Sec. 288(b)).

Reasons for Denying the Writ

The Taking of the Indians' Lands Was An Act Inconsistent with the Indian Title and Did Not Grow Out of the Government's Title of Naked Fee.

No new question is here presented.

The salient points have all been many times decided. The complete title to Indian tribal lands, whether held under aboriginal title or by reservation, are concurrently shared by the Indian tribe and the United States Government. The Indian part in such title is a right of perpetual occupancy as sacred as the fee simple. The United States part in such title is the naked fee.

For more than a century this court has repeatedly recognized that original Indian title creates legal and equitable rights. *Johnson* v. *M'Intosh*, 8 Wheat. (U. S.) 543, 5 L. ed. 681; *U. S.* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 86 L. ed. 260; *U. S.* v. *Shoshone Tribe*, 304 U. S. 111, 82 L. ed. 1213; *U. S.* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, 82 L. ed. 1219; *Worcester* v. *Georgia*, 6 Pet. (U. S.) 515, 8 L. ed. 483; *Mitchel* v. *United States*, 9 Pet. (U. S.) 711, 9 L. ed. 283; *Chouteau* v. *Molony*, 16 How. (U. S.) 203, 14 L. ed. 905; *Holden* v. *Joy*, 17 Wall. (U. S.) 211, 21 L. Ed. 523; *Buttz* v. *Northern P. R. Co.*, 119 U. S. 55, 30 L. ed. 330,

7 S. Ct. 100; *Cramer* v. *United States*, 261 U. S. 219, 67 L. ed. 622, 43 S. Ct. 342; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. ed. 469, 16 S. Ct. 360; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 S. Ct. 650.

Such rights are legally enforceable against everyone except the sovereign who cannot be sued without his consent. Where such consent has been given, as in this case, they are enforceable against the United States in the same manner and to the same extent as against anyone else.

The United States has the sovereign power to go beyond the rights growing out of its title. This power is because "the King can do no wrong," and the Government cannot be sued without its consent, but any exercise of power in violation of the Indians' rights can form the proper subject matter for a jurisdictional act.

To be sure the exercise of such arbitrary sovereign power is effective for all purposes and it was effective here. By the use of such power the Government effectually acquired the full title to the Indians' land. It passed it on to its grantees and no one could question their title. That was true in the Shoshone case where the Government without let or hindrance acquired title to one-half interest in the Shoshone's lands. However, the act of the Government in that case was made the subject of a jurisdictional act and the Indians recovered. *Shoshone Tribe* v. *United States*, 299 U. S. 476.

In the instant case the Indians had complete Indian title. The Government had the naked fee. The Government dispossessed the Indians and took their lands without compensation. This was not in pursuance of rights growing out of the naked fee. They could not sue the Government for

thus violating their rights. They had a valid but unenforceable claim against the Government. The jurisdictional act gave Respondents the right to assert the claim by proving their Indian title. This the Court's unchallenged findings show was done.

After the Government has waived its sovereignty and consented to be sued, it is wholly untenable to permit a successful defense based on the exercise of its arbitrary sovereign power.

Petitioner contends there is a difference between a title in a reservation recognized by treaty or act of Congress on the one hand and Indian title by aboriginal possession on the other. The former could not be any stronger than the latter because it is as sacred as the fee. Petitioner grants that the taking by eminent domain of the land held under the recognized title is a proper subject for claim (Pet. p. 12). Petitioner then states that "the extinguishing of aboriginal Indian title creates at most only a moral obligation." In the Shoshone case the Government contended that the right to use and occupy the land of the reservation which was granted by the treaty did not include the ownership of the timber and minerals but the court there said that "the tribe *had the right of occupancy with all its beneficial incidents; that the right of occupancy being the primary one and as sacred as the fee,* division by the United States of the Shoshones' right with the Araphahoes was an appropriation of the land pro tanto; that although the United States always had legal title to the land and power to control and manage the affairs of the Indians it did not have power to give to others or to appropriate to its own use any part of the land without rendering or assuming the obligation to pay, just compensation to the tribe, for that would be not the exercise of guardianship or management, but confiscation." (Italics supplied.)

It will thus be seen that the Court did not regard aboriginal title in that case to have been enhanced or changed by the treaty. In the case of *United States* v. *Klamath and Moadoc Tribes*, 304 U. S. 119, the Court stated:

> "1. The United States contends that the lower court erred in including the value of timber. The tract taken was a part of the reservation *retained by plaintiffs out of the country held by them in immemorial possession*, from which was made the cession by the treaty of October 14, 1864. The clause declaring that the district retained should, until otherwise directed by the President, be set apart as a residence for the Indians and 'held and regarded as an Indian reservation' *clearly did not detract from the tribes' right of occupancy.* The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as a part of the compensation for the lands taken." (Italics supplied.)

The Supreme Court has indicated that whether the land was in a reservation or unceded lands does not change the title. We quote:

> "While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract." *Minnesota* v. *Hitchcock*, 46 L. ed. 954, 963; 185 U. S. 373, 388.

The existence of rights growing out of title by aboriginal possession without recognition is so clearly stated in the brief of the United States in the case of *United States* v. *Santa Fe RR. Co.*, 314 U. S. 339, that we respectfully refer the Court to that brief. The presentation of authorities and the reasoning in the Government's brief therein constitute one of the clearest statements on the subject.

This brief of the Government was in answer to the precise position now taken by the Petitioner in this case.

The contention of the Santa Fe Railroad, which the Supreme Court rejected, was stated in its brief as follows:

> "* * * political recognition is necessary to the creation of legal Indian possessory right, *Barker* v. *Harvey, supra, Hayt* v. *United States,* 38 Ct. Cls. 455, *Duwamish et al., Indians* v. *United States,* 79 Ct. Cls. 530 (certiorari denied, 295 U. S. 755), *Coos Bay Indian Tribe, et al.* v. *The United States,* 87 Ct. Cls. 143, 152-3 (certiorari denied, 306 U. S. 653), * * *."

It will thus be seen that the Santa Fe Railroad brief even cited the cases relied upon to support the petition in the case at bar.

In a vigorous reply brief in the Santa Fe case the Government again reviewed the cases cited in its original brief and then adds the following footnote:

> "The only judicial authority that is cited by respondent for the rule that Indian title does not exist in the absence of specific affirmative recognition, is a dictum by the Court of Claims in *Hayt* v. *United States,* 38 Ct. Cl. 455, 464 (1903), quoted in Respondent's brief, pt. 1, at p. 33, and again at p. 93, that 'Indian country' in New Mexico and Utah was limited to formal reservations. This view (which seems to have been largely based on the opinion of this Court in *United States* v. *Joseph,* 94 U. S. 614 (1876), was definitely repudiated in *United States* v. *Candelaria,* 271 U. S. 432 (1926),

and *United States* v. *Chavez*, 290 U. S. 357 (1933). Any inference from this dictum that the Court of Claims intended to deny these Indians a possessory right in the lands they aboriginally occupied is refuted by the opinion of the Court of Claims itself in *Ute Indians* v. *United States*, 45 Ct. Cl. 440 (1910), where it was held that relinquishment of aboriginal possessions was valid consideration for an agreement by the United States." (Reply Brief of the Government in *United States* v. *Santa Fe Pacific Railroad Co.*, p. 34.)

This Honorable Court sustained the position outlined in the brief of the United States and held:

> "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer Case, 'The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive.' 261 U. S. at 229, 67 L. Ed. 626, 43 S. Ct. 342." *United States* v. *Santa Fe RR. Co.*, 314 U. S. 339.

The Santa Fe case was an action taken by authority of the Attorney General without any authority by Congress and the Court adjudicated the title. This shows that the title does not depend upon congressional recognition.

Legislative and Executive Construction

The report of the Secretary of Interior and the passage of the bill by Congress indicates that both the Executive and the Legislative branch of the government construed this act as providing that the Indians proving aboriginal title should be paid for such lands. The report by Honorable Harold L. Ickes, Secretary of Interior, recommends the passage of the bill bearing the present language and states:

> "The Indians are of the belief that their claims are valid and that the provisions of the ratified treaties

have not been fully carried out. *They are also of the opinion that they should be paid for the lands under the unratified treaty.*" (Italics supplied.)

This was quoted in the reports on the bill by both House and Senate Committees. H. Rep. No. 1085 and S. Rep. No. 795, 74th Cong., 1st Sess.

The Jurisdictional Act

We desire to dispute sharply the Petitioner's statement in a footnote that in the three cases cited "The Court of Claims found it unnecessary to pass upon the government's liability as a matter of law * * *" (Petition, p. 11).

The cited cases do not support Petitioner's position. On the contrary the cases definitely show that where the Jurisdictional Acts granted the power, the Court would adjudicate the rights acquired by occupancy.

The Jurisdictional Act in the Coos Bay Tribe of Indians v. *U. S.*, 87 Ct. Cls. 143, *is precisely the same as in the case at bar.* Now bearing that in mind let us examine it.

The whole opinion was based upon the assumption that the Jurisdictional Act gave the Court the authority to adjudicate the rights based upon Indian occupancy. Without any suggestion by the Court that it did not have such right, the evidence was carefully analyzed by the Court and held to be insufficient to support the allegations of the complaint. There was no suggestion that the complaint was not good.

The Court was demonstrating, first, that the Government had not recognized the Plaintiff's title to this land (which would have obviated further proof) and therefore that possession must be proved; and second, that the proof was insufficient.

Now consider the case of *The Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378. The holding there was not, that a

a tribal claim to any particular lands must be based upon a treaty, statute or other formal governmental action, but that the Jurisdictional Act did not authorize the Court to make adjudication on aboriginal occupancy.

However, the case of *Wichita Indians, et al.* v. *U. S., supra,* in emphasizing the lack of proper language in the Jurisdictional Act there pointed to the case of *The Assiniboine Tribe* v. *U. S.*, 77 Ct. Cls. 347, and the *Coos Bay Indian* case, 87 Ct. Cls. 143, as illustrations of jurisdictional acts which specifically confer jurisdiction and authority to adjudicate and render judgment on an occupancy title. We quote from the *Wichita* case:

> "In *Assiniboine Indian Tribe v. United States, supra,* the jurisdictional act, as amended, specifically conferred jurisdiction and authority to adjudicate and render judgment on a use and occupancy title by immemorial possession. This court held that a claim to title to lands based on immemorial possession could not be sustained where the evidence showed that other tribes similarly occupied and possessed such territory. In *Coos Bay Tribe of Indians case, supra,* the jurisdictional act also specifically authorized jurisdiction and entry of judgment upon the claim 'arising under or growing out of the original Indian title, claim, or rights of the said tribe * * *.'" (*Wichita Indians et al.* v. *U. S.*, 89 Ct. Cls. 378 at 419.)

Therefore unless this Court should overthrow this logical line of decisions the holding sought for by the Petitioner must be denied. This for the reason that the Court in the *Wichita* case expressly holds that the Jurisdictional Act in the *Coos Bay case,* "specifically authorized jurisdiction and entry of judgment upon," such a claim. The language of the jurisdictional Act in the case at bar is exactly the same as that quoted by the Court in the *Coos Bay* case.

We also wish to dispute Petitioner's statement in the same footnote (Pet. p. 11) that the *Duwamish* case, 79 C. Cls. 530, supports its position.

The jurisdictional act in that case dealt only with certain treaties or acts of Congress, and the Court of Claims held that it had no jurisdiction to adjudicate claims not specifically mentioned.

The Court below answered Petitioner's inaccurate contention by saying: "The Duwamish case did not hold or intend to hold that an Indian tribe could not recover compensation on the basis of original Indian use and occupancy title as for a taking if the jurisdictional act authorized the bringing of a suit and rendition of judgment for compensation on the basis of such original title" (R. 76).

It is crystal clear that the Court in the *Duwamish* case was dealing with a Jurisdictional Act which did not, as in the *Coos Bay* case and the present case, specifically confer jurisdiction and authority to adjudicate and render judgment in a claim arising under or growing out of the original Indian title, claim or rights of said tribe.

Wherever the Jurisdictional Act has conferred such jurisdiction the Court of Claims has not hesitated to exercise it and the distinction between a Jurisdictional Act giving the right and one failing to give the right is illustrated quite clearly in *Wichita Indians* v. *U. S.*, 89 Ct. Cls. 378 at 419.

See also cases cited in the opinion of the Court of Claims in this case.

The opinion of the Court of Claims in this case is the clearest statement on the subject. We quote:

> "From the standpoint of the legal and equitable nature of a claim and the legal principles applicable thereto, the fundamental right of an Indian tribe to recover compensation for having been deprived by the United States of the beneficial aboriginal ownership of land is no different in a case where the United States has consented to be sued on the basis of original Indian

title from a case where the United States has consented to be sued on the basis of a claim arising under or growing out of a treaty, agreement, or act of Congress, except in the nature and degree of proof required to establish use and occupancy title. Where consent to be sued on the basis of original Indian title has been given, as in this case, occupancy of these Indians to the exclusion of other tribes necessary to establish aboriginal possessory title is a 'question of fact to be determined as any other question of fact.' *United States, as Guardian of the Hualpai Indians of Arizona,* v. *Santa Fe Pacific Railroad Co.,* 314 U. S. 339. Cf. *The Assiniboine Indian Tribe* v. *United States,* 77 C. Cls. 347; *Coos (or Kowes) Bay, Lower Umpqua (or Kalawatset), and Siuslaw Indian Tribes* v. *The United States,* 87 C. Cls. 143. But where the consent to be sued is limited to a claim, or claims, arising under or growing out of a treaty, agreement, or act of Congress, proof of aboriginal use and occupancy title is not necessary where such treaties, agreements, or acts of Congress specifically provide or recognize that the land in respect of which claim is made has been or is set apart for the exclusive use and occupancy of the tribes concerned, or jointly for them and other tribes with their consent. *Shoshone Tribe* v. *United States,* 82 C. Cls. 23; 299 U. S. 476. In the case of a treaty title, the Indians concerned simply reserve, by specific recognition in the treaty, their original title to certain of their lands, or acquire exclusive use and occupancy title to other lands, in exchange for lands to which they had held original Indian Title. Where the consent to be sued is limited to claims arising under or growing out of a treaty, and the treaty relied upon is only a treaty of peace and amity and does not admit or recognize an exclusive use and occupancy title of the Indians to the lands in respect of which claim is made, the court is without authority to determine, adjudicate, and render judgment upon the basis of aboriginal Indian title. *Duwamish, et al. Tribes of Indians* v. *United States,* 79 C. Cls. 530. *The Crow Nation or Tribe of Indians of Montana* v.

United States, 81 C. Cls. 238, 269 U. S. 281; *The Wichita Indians, et al.* v. *United States, supra;* and *The Northwestern Bands of Shoshone Indians* v. *United States*, 95 C. Cls. 642, affirmed March 12, 1945, 324 U. S. —." (R. 70-72).

Recognition

Recognition was shown. *In addition* to what the lower Court so succinctly pointed out we might add:

1. The quotation from the letter of the Commissioner of Indian Affairs to Joel Palmer, August 12, 1854: (Senate Executive Document numbered 25, Fifty-third Congress, first session, p. 22)

> "Sir: You have been designated by the President of the United States as the officer of the Indian Department to negotiate treaties of peace *and acquisition* with the Indian tribes in Oregon, as provided for by a clause of the first section of the act of Congress approved July 31, 1854, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department.'
>
> "The clause referred to is as follows:
>
> " 'For the expenses of negotiating treaties with and making presents of goods and provisions to the Indian tribes in the Territory of Oregon, sixty-eight thousand dollars.'
>
> • • • • • • •
>
> "You will furnish me with a skeleton map of Oregon Territory, showing the *location of the different Indian tribes*, with the extent of territory claimed by each, and the nature of the tenure or claim, and as treaties are made designate the reserve provided for Indian use, with such precision that it may be laid down on the map here." (Italics supplied.)

2. The detailed report of Gen. Palmer showed who had title. It was his official duty under his appointment by the

President (acting under authority of the Act of July 31, 1854) to ascertain the location of the several tribes of Indians who occupied and held possession thereof and to secure the signatures of the bands and tribes of Indians whose title to the lands was to be extinguished. His report was a recognition of the aboriginal possession *as to Respondent tribes who are given judgment here* for he describes their lands. (Senate Document numbered 25, Fifty-third Congress, first session, pp. 22 to 32).

This was approved by the Commissioner of Indian Affairs who under the law had the responsibility thereunder in the following language:

> "The extent of country *to which the Indian title is by these articles relinquished* is estimated at about 5,000,000 acres, and the extent of the reservation at 750,000 to 800,000 acres. The reserve, it will be observed, lies within the limits reserved from sale by order of the President of the 9th of November, A. D., 1855." (Senate Document numbered 25, Fifty-third Congress, first session, p. 8)

It was approved by the Secretary of the Interior and by the President when he sent it to the Senate for consent to its ratification.

3. The army officers under the authority of the War Department cooperating with Indian agents moved them from their lands on to the reservation. Paid their fare out of the Government's money at so much per head. There was also the *payment of earnest money*, under direction of Congress in keeping with the terms of the treaty. (Article 3 of the unratified treaty. See Senate Document numbered 25, Fifty-third Congress, first session, pp. 49-57).

4. In 1868 the Congress in an appropriation act recognized the reservation as originally created by executive order. This was after the Presidential order of 1865 taking

away tract 479, part of the Coast reservation. The Act reads:

> "For Indians upon the Siletz reservation, Oregon, to provide agricultural implements, seeds, cattle, and so forth, to compensate them for losses sustained by reason of executive proclamation taking from them that portion of their reservation called Yaquina Bay, six thousand dollars" (Act of July 27, 1868, 15 Stat. 218).

Geo. W. Manypenny, Commissioner of Indian Affairs, in his report to the Secretary of Interior (Senate Document numbered 25, Fifty-third Congress, first session, p. 8) had made the following statement when commenting on the reserve set out in the unratified treaty:

> "The reserve it will be observed lies within the limits reserved from sale by order of the President of the 9th of November A. D. 1855" (Senate Document numbered 25, Fifty-third Congress, first session, p. 8).

5. Annual Reports of the Commissioner of Indian Affairs officially communicated by the Secretary of Interior to Congress show many recognitions of the Indian title to the lands which the Court's opinion held belonged to Respondent Indian tribes. Some of these quotations from these annual reports are from the Superintendent of Indian Affairs, some from U. S. Indian Agents and some are the Commissioner's own language. We shall give only a few dates and quotations:

1863

> "• • • The Indians relying upon the promises made by the former Superintendent Palmer by whom the treaty was negotiated promptly removed to the stipulated reservation without awaiting the ratification of the treaty. They now complain and justly, that they have sold *all their former possessions which have been taken possession of by the whites* and that they have

realized none of the benefit which they were assured would result from the treaty. • • •

"• • • But as the Senate failed to ratify the treaty *the title to the whole territory above specified is still vested in the Indians, the white settlers thereon are but trespassers upon Indian lands*" (Annual Rep. p. 9).

1862

"• • • They say 'they made a treaty with the government, *sold their lands, abandoned their country,* and in compliance with the stipulations of said treaty they removed to this reservation where they had continued to live and in doing so have fulfilled their part of the agreement but not so the government. On the contrary it never has ratified the treaty and has done nothing but pay them in promises for the land abandoned. This treaty they say was made many years ago and they have waited patiently for their Great Father to fulfill his promises but they cannot wait much longer.' *"I have done and said everything in my power to convince them that the government will yet fulfill its promises and act in good faith but all to no purpose"* (Annual Rep. p. 60).

1864

"• • • They abandoned large tracts of land to the United States, now occupied by the whites, and promptly removed upon the reserve proposed for their residence, and have since continued to reside upon it. • • •"

"• • • *They were induced to remove to the reservation by late Superintendent Joel Palmer in 1855 and a treaty for the purchase of their lands concluded.* The senate failed to ratify the treaty and they have consequently never received anything under it. But their part of the stipulation have all been complied with. *They gave up their lands* and they have since been occupied by whites. • • •" (Italics supplied.)

"• • • They have waited anxiously for ten years for the fulfilment of the promises made to them *when*

they surrendered their lands to the United States" (Annual Rep. p. 11.)

1867

"• • • *They then ceded their lands* and removed to the Coast reservation, (Siletz agency,) expecting that the government would fulfil its part in carrying into effect the stipulations of that treaty; but in this they have been greatly disappointed. • • •"

"• • • By the terms of the treaty *the Indians ceded all their lands,* and agreed to remove to the coast reservation; in consideration the government promised to pay certain annuities, to build mills, provide schools, physicians, open farms, erect buildings, &c. This treaty the Senate refused to ratify, and it has therefore not been held to be binding upon the United States; but the Indians fully complied with the terms of their side of the treaty, abandoned their lands, removed to the reservation designated for them, and have, with few exceptions, remained there since. White settlers occupied their lands, and still occupy them. The Indians complain, and justly I think, that having complied with their side of the treaty, we ought to comply with ours • • •" (Annual Rep. p. 7).

1871

"As an officer of the United States Indian Department, I demand, in behalf of the Indians of Oregon, that their rights be regarded, and justice done them in some way, either by paying them *for their lands,* or allowing them to locate homes in common with the white men who are making the Indian country so valuable. This subject is one that concerns the welfare of thousands of white people settled on the lands still claimed by these Indians. The importance of prompt action is manifest, when it is known that some of them have already taken council of able lawyers, who give them encouragement to prosecute their claims. • • •." (Annual Rep. p. 721.) (All italics supplied.)

These are documents of which this Court takes judicial notice. They were introduced as a chain in the proof of

occupancy. However, they also show recognition of the most definite kind.

They constitute abundant rec nition of the Indians' title to the lands from which ey had been dispossessed and as was said about simil reports in a case in the Supreme Court, "these reports were officially communicated by the Secretary of the Interior to Congress and there is nothing to show any disapproval. * * *" *Donnelly* v. *U. S.*, 228 U. S. 243 at 258; 57 L. Ed. 820 at 826.

Conclusion

Respondents had the title "as sacred and as securely safeguarded as is a fee simple absolute title." This was shown when the proof was made of their aboriginal possession and occupancy. Recognition though not necessary has been shown. That the Government took it for its own public use without compensation is admitted. Respondents lacked only the authority to sue the Government. This the jurisdictional act gave in unequivocal language.

We respectfully submit that the Petition for writ of certiorari should be denied.

EVERETT SANDERS,
Shoreham Building,
Washington 5, D. C.,
JOHN G. MULLEN,
North Bend, Oregon,
E. L. CRAWFORD,
Salem, Oregon,
Attorneys for Respondents.

L. A. GRAVELLE,
DOUGLAS WHITLOCK,
EDWARD F. HOWREY,
Shoreham Building,
Washington 5, D. C.,
Of Counsel.

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APPENDIX

(Public—No. 332-74th Congress)
(S. 2761)

An Act

Conferring jurisdiction upon the Court of Claims to hear and determine claims of certain bands or tribes of Indians residing in the State of Oregon.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That jurisdiction is hereby conferred on the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, as in other cases, to hear, examine, adjudicate, and render final judgment (a) in any and all legal and equitable claims, arising under or growing out of any treaty, agreement, Act of Congress, or Executive order, or for the failure of the United States to pay any money or other property due, which those Indian tribes or bands, or portions thereof, and their descendants, described in the ratified treaties of September 10, 1853 (10 Stat. 1018), September 19, 1853, (10 Stat. 1027), November 18, 1854 (10 Stat. 1122), November 25, 1854 (10 Stat. 1125), January 22, 1855 (10 Stat. 1143) and December 21, 1855 (12 Stat. 981), may have against the United States; and (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim, or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and bands described in the unratified treaties published in Senate Executive Document Numbered 25, Fifty-third Congress, first session (pp. 8 to 15), at and long prior to the dates thereof, except the Coos Bay, Lower Umpqua and Siuslaw Tribes, it being the intention of this Act to include all the Indian tribes or bands and their descendants, with the exceptions named, residing in the then Territory of Oregon west of the Cascade Range at and long prior to the dates of the said unratified treaties, some of whom, in 1855, or later, were removed by the military authorities of the United States to the Coast

Range, the Grande Ronde, and the Siletz Reservations in said Territory.

Sec. 2. That if any claim or claims be submitted to said courts hereunder they shall settle the rights therein, both legal and equitable of each and all the parties thereto, notwithstanding the lapse of time or the statutes of limitation; and any payment which may have been made under any claim or agreement shall not operate as an estoppel but may be pleaded as a set-off, and the United States shall be allowed to plead, and shall receive credit for all sums including gratuities, paid to or expended for the benefit of the respective tribes or bands of Indians, but no expenditures for the benefit of these Indians made out of appropriations authorized by the Act of June 18, 1934, (48 Stat. L. 984), shall be considered as offsets. The claim or claims of each tribe or band may be presented separately or jointly by petition, subject, however, to amendment and consolidation in proper cases. Such action or actions shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant; and any nation, tribe or band the court may deem necessary to a final determination of such suit or suits may be joined therein by order of the court.

The petition shall set forth all the facts upon which the claims are based and shall be signed and verified by the attorney or attorneys employed to prosecute such claim or claims and who are under contract with said Indians approved in accordance with existing law. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this act.

Official letters, papers, documents and public records, or certified copies thereof, may be used in evidence and the departments of the Government shall allow the attorney or attorneys access to such treaties, papers, correspondence, or records as may be needed by said attorney or attorneys.

Sec. 3. That upon the final determination of such suit, or suits, the Court of Claims shall decree such fees not exceeding 10 per centum of the amounts recovered as it

shall find reasonable to be paid the attorney or attorneys employed therein by said Indians or bands of Indians, under contracts negotiated and approved as provided by existing law, together with all necessary and proper expenditures incurred in the preparation and prosecution of the suit or suits.

Sec. 4. The proceeds of all amounts, if any, recovered for said Indians, less attorneys' fees and expenses, shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled therefor and shall draw interest at the rate of 4 per centum per annum from the date of the original judgment or decree and thereafter shall be subject to appropriation by Congress.

Approved, August 26, 1935.